

3. On November 1, 2013, the Commission released a *Licensing Public Notice*, seeking additional comment on this transition, including protections for “incumbent operators.”⁸ On April 23, 2014, the Commission released a *Further Notice of Proposed Rulemaking*, noting again that certain commenters had urged that “existing 3650-3700 MHz users” should be provided with a period to transition to the new framework.⁹ The *3.5 GHz FNPRM* recognized “the significant investment that incumbent 3650-3700 MHz licensees have made,” and proposed specific rules designed to accommodate that investment.¹⁰ Under these proposed rules, “existing 3650-3700 MHz operations” would be “grandfathered” for a period of five years after the effective date of the proposed rules.¹¹ Under the rules proposed in the *3.5 GHz FNPRM* to address existing 3650-3700 MHz licensees, eligibility would be limited to entities “authorized under this Part as of [adoption date],” and no new licenses would be issued after that date.¹²

4. On April 17, 2015, the Commission adopted a *Report and Order and Second Further Notice of Proposed Rulemaking* that established a new Citizens Broadband Radio Service in the 3550-3700 MHz band (3.5 GHz Band).¹³ The *3.5 GHz Order* adopted the supplemental proposal to incorporate the 3650-3700 MHz band into the Citizens Broadband Radio Service. However, the Commission again recognized that many incumbents in that band had made “substantial investments in equipment deploying various services in the band,” and accordingly established specific protections designed to preserve the “existing . . . investment” of these “prior existing 3650-3700 MHz licensees.”¹⁴ Section 90.1307(b) of the new rules also stipulates that “The Commission shall issue no new licenses . . . under this section after April 17, 2015”¹⁵

B. TEACH Waiver Request

5. TEACH is a non-profit corporation based in rural Muhlenberg County, Kentucky, that “emphasizes supporting the Work Ready Community¹⁶ initiatives surrounding broadband availability, GED and higher education attainment, National Career Readiness Certificate, and soft skills certifications, and college and career readiness.”¹⁷ In 2012, Muhlenberg County began the process of

⁸ Commission Seeks Comment on Licensing Models and Technical Requirements in the 3550-3650 MHz Band, *Public Notice*, 28 FCC Rcd 15300, ¶ 51 (2013).

⁹ Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, *Further Notice of Proposed Rulemaking*, 29 FCC Rcd 4273 at 4322-23, ¶ 164 (2014) (*3.5 GHz FNPRM*).

¹⁰ *Id.* at 4323, ¶ 165.

¹¹ *Id.* at 4323 and 4351, ¶ 166 and Appx. B (section 90.1338).

¹² *Id.* Appx. B at 4351 (sections 90.1303, 90.1307) (brackets in original). These brackets served as a placeholder for the date of adoption of the proposed rules.

¹³ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, GN Docket No. 12-354, *Report and Order and Second Further Notice of Proposed Rulemaking*, 30 FCC Rcd 3959 (2015) (*3.5 GHz Order*).

¹⁴ *3.5 GHz Order*, 30 FCC Rcd at 4074-76, ¶¶ 394-99.

¹⁵ *Id.* at App. A (47 C.F.R. § 90.1307(b)). April 17, 2015 was the adoption date of the rules.

¹⁶ Work Ready programs exist across the United States, whereby communities that meet certain educational, workforce development, and collaboration goals can earn a Work Ready Community certification. See Kentucky Work Ready Communities, Common Questions About the Program, at: <http://workready.ky.gov/FAQ.aspx>; Kentucky Work Ready Communities, Work Ready Community Application at 2, available at: <http://workready.ky.gov/Downloadable/2015WorkReadyCompleteApplicationPacket.pdf>. See also TEACH Request at 10.

¹⁷ TEACH Request at 10.

obtaining a Work Ready Community certification from the Commonwealth of Kentucky.¹⁸

6. As a part of the Work Ready Community certification process, the Muhlenberg County Fiscal Court (Fiscal Court) pledged to provide \$250,000 over three years to increase broadband availability within the county.¹⁹ In addition, on November 12, 2013, the Delta Regional Authority (DRA)²⁰ awarded the County a \$119,965 grant to fund broadband infrastructure in Muhlenberg County;²¹ the DRA grant requires the Fiscal Court to complete the proposed project by March 2016.²² On March 20, 2015, the Felix E. Martin Jr. Foundation²³ awarded an additional \$220,000 grant to the Fiscal Court, such that the total amount represented by the Fiscal Court, DRA, and Felix E. Martin Jr. Foundation grants is \$591,802.14.²⁴ On April 30, 2015, the Fiscal Court awarded the entire sum to TEACH to complete the project to increase broadband availability using 3650-3700 MHz spectrum.²⁵

7. TEACH states that it learned of section 90.1307(b)'s "freeze" on new 3650-3700 MHz licenses on May 14, 2015, after TEACH had been awarded the grant and purchased all transmission and customer premise equipment.²⁶ TEACH states that it now has secured rights to use space to mount its transmission equipment at all five proposed access points within Muhlenberg County, and is completing coordination in order to apply for five new 11 GHz point-to-point links for network connectivity and backhaul.²⁷ It claims that it currently has a waiting list of 156 people and that "[b]ut for the absence of a license or other operating rights to 3650-3700 MHz spectrum, TEACH would have already completed construction of its network, installed customer premise equipment and initiated service."²⁸

8. On November 18, 2015, TEACH submitted the Request, which included a manual application for a new nationwide 3650-3700 MHz license, as well as request for waiver of section 1.913(b) to permit the manual filing of the application and of section 90.1307(b) to permit acceptance and grant of the application.²⁹ The waiver of 90.1307(b) was necessary because the Commission, as it had envisioned throughout the proceeding creating the Citizens Broadband Radio Service, decided to incorporate the 3650-3700 MHz band into the new rules and to stop accepting new applications under the previously applicable rules. On December 9, 2015, TEACH's application was placed on public notice as accepted for filing.³⁰ The public notice provided that acceptance for filing was "subject to the pre-grant notice and

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The U.S. Congress established the DRA to "make strategic investments of federal appropriations into the physical and human infrastructure of Delta communities." Delta Regional Authority, About Delta Regional Authority, *at*: <http://dra.gov/about-dra/mission-and-vision/>.

²¹ The engineering and costs of the grant were based on using a 3.65 GHz base coverage for the service areas. TEACH Request at 11.

²² *Id.*

²³ The Felix E. Martin Jr. Foundation is a private foundation based in Muhlenberg County. See Felix E. Martin Jr. Foundation, *at*: <http://www.felixmartinfoundation.org/>. See also TEACH Request at 11, 18.

²⁴ TEACH Request at 11.

²⁵ *Id.*

²⁶ *Id.* at 11, 13.

²⁷ *Id.* at 11, 12.

²⁸ *Id.* at 12.

²⁹ *Id.* at 11. See also File No. 0007044353.

³⁰ Wireless Telecommunications Bureau Site-By-Site Accepted for Filing, *Public Notice*, FCC Report No. 10995 (rel. Dec. 9, 2015), at 68.

petition procedure of Section 309 of the Communications Act of 1934, as amended.”³¹

III. DISCUSSION

9. In its Request, TEACH argues that based on all of the unique and usual circumstances it presents, a waiver grant is warranted.³² After careful review of the Request, we find that TEACH has satisfied the requirements of section 1.925 and that granting its Request on the basis of its unique circumstances would serve the public interest.

10. Under section 1.925, the Commission may grant an applicant’s request for a waiver if it is shown that: “(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”³³

11. As stated above, the Commission will not issue any new nationwide 3650-3700 MHz Wireless Broadband Service licenses after April 17, 2015.³⁴ TEACH states that its circumstances, taken together, satisfy the conditions required for the Commission to waive this rule under the second prong of section 1.925.³⁵ TEACH argues that due to the “unique and unusual” factual circumstances described above, strictly applying section 90.1037(b) would be inequitable, unduly burdensome, and contrary to the public interest.³⁶ TEACH explains that both it and Muhlenberg County “have accepted legal obligations and expended significant funds to implement the project.”³⁷ TEACH claims that if it is “unable to obtain the rights to use 3650-3700 MHz spectrum, the project may need to be unraveled and abandoned unless significant changes – which may not be possible – can be overcome.”³⁸ TEACH also claims that “there is no certainty that Muhlenberg County or the DRA would be willing to accept any modified terms.”³⁹

12. TEACH asserts that it is a non-profit organization that benefits Kentucky’s rural citizens, including the 156 who already are on the waiting list for its service.⁴⁰ TEACH states that it “was established to implement grants that would result in the construction and operation of fixed broadband services to a significant unserved and underserved population in rural Kentucky, where cable, DSL and fiber connections are either non-existent or offer low speeds.”⁴¹ TEACH further explains that as a non-profit entity dedicated to providing educational opportunities, TEACH will not be distributing profits to shareholders but will put those funds to use to further promote its community-based mission, including

³¹ *Id.* at 1. See 47 U.S.C. § 309(b).

³² TEACH Request at 12.

³³ 47 C.F.R. § 1.925(b)(3).

³⁴ TEACH Request at 11; 47 C.F.R. § 90.1307(b).

³⁵ TEACH Request at 12.

³⁶ *Id.*

³⁷ *Id.* at 13 (also stating that “TEACH has agreed to complete build-out and to offer service to the public by December 31, 2015, and the County has acquired hundreds of thousands of dollars in transmission and customer premise equipment.”).

³⁸ *Id.*

³⁹ *Id.* at 14. As stated in the Background section above, the grant awarded by the DRA requires the County to complete the proposed project by March 2016.

⁴⁰ *Id.* at 12.

⁴¹ *Id.*

re-investing revenues into network expansion and technology.⁴² It bolsters its claim by including letters to the Commission from various Muhlenberg County entities stating the importance of the project to the County.⁴³ Additionally, TEACH states that it has done substantial research and determined that the 3650-3700 MHz band offered the best combination of coverage, throughput, and cost for the hilly and foliated environment of rural Western Kentucky.⁴⁴

13. Finally, TEACH also requests a waiver of section 1.913(b), which mandates electronic filing for licenses in most wireless services, including the 3650-3700 MHz band.⁴⁵ As the Commission's electronic Universal Licensing System (ULS) currently will not accept applications for the 3650-3700 MHz band due to section 90.1307(b)'s moratorium on new licenses, the only way for TEACH to file its application is manually.⁴⁶

14. We find that TEACH has described unique and unusual factual circumstances that warrant a waiver of sections 90.1307(b) and 1.913(b), and that granting its request would serve the public interest. As noted above, parties had notice from the *3.5 GHz FNPRM* that applications no longer would be granted after the adoption date of the *3.5 GHz Order*. The Commission's decision was clear and serves a significant policy purpose; specifically to create a 150 megahertz band of spectrum for a new innovative shared spectrum access scheme. However, we believe that based on the totality of the above circumstances, strictly applying the rules here would be unduly burdensome and could have negative effects on broadband competition in the affected areas. We also believe that granting the waiver request would further the Commission's long-standing goal of ensuring rural areas have access to broadband communications services.⁴⁷ One of the Commission's stated goals in creating the Citizens Broadband Radio Service was to "add much-needed capacity to meet the ever increasing demands of wireless innovation."⁴⁸ Denying prospective customers in rural or underserved areas the opportunity to purchase wireless broadband service from TEACH would be inconsistent with the Commission's public interest goals for this band, and for promoting broadband deployment in such areas.

15. In addition, on balance, granting this waiver request would not have a meaningful negative impact on the future development of the Citizens Broadband Radio Service. Section 90.1338 accords "grandfathered" status only to fixed or base station registrations filed in ULS on or before April 17, 2015.⁴⁹ Since TEACH is not eligible to register any grandfathered sites, its network deployments will not be protected from harmful interference under section 96.21,⁵⁰ and it must ultimately transition to the new Citizens Broadband Radio Service.⁵¹ As such, granting TEACH a license will not restrict future

⁴² *Id.* at 14.

⁴³ *Id.* at 12-13, Ex. 2.

⁴⁴ *Id.* at 14.

⁴⁵ See 47 C.F.R. § 1.913(b).

⁴⁶ TEACH Request at 10.

⁴⁷ See generally, e.g., Facilitating the Provision of Spectrum-Based Services to Rural Areas and promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004). See also, e.g., Airwave Wireless, L.L.C. & GW Wireless, Inc., 22 FCC Rcd. 1451, 1456 ¶ 10 (2007).

⁴⁸ See *3.5 GHz Order*, 30 FCC Rcd at 3961, ¶ 1.

⁴⁹ See 47 C.F.R. § 90.1338.

⁵⁰ 47 C.F.R. § 96.21.

⁵¹ In that regard, in order to comply with our rules going forward and avoid service interruption to its customers, we encourage TEACH to plan in the near term for the transition to the Citizens Broadband Radio Service.

Citizens Broadband Radio Service deployments or negatively affect spectrum availability in the band.⁵² We note that upon the issuance of this waiver, TEACH is subject to the same rules and conditions as any other similarly situated 3650-3700 MHz licensee.⁵³

16. For the reasons set forth above, we grant TEACH's waiver petition and grant the requested license. We emphasize that, consistent with Commission precedent, we grant this waiver request based on all of the circumstances described – no one factor is dispositive of a grant or denial.⁵⁴

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the waiver petition filed by TEACH is granted and, accordingly, its license application, File No. 0007044353, is granted.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman
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⁵² In fact, TEACH states that it “is not seeking grandfathered status for any locations it will register, [and] its operations will not preclude use of the 3650-3700 MHz band by others.” TEACH Request at 15.

⁵³ See 47 C.F.R. §§ 90.1338, 96.21.

⁵⁴ Consistent with established Commission precedent, we must consider each waiver on an individual basis and on the particular merits of the situation. See, e.g., *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).